of the land in return for a compensation based upon the tonnage of coal extracted and delivered to the owners, acquired, by reason of such contracts, an economic interest in the coal in place so as to entitle the taxpayers to an allowance for depletion under Sections 23(m) and 114(b) of the Internal Revenue Code of 1939. The District Court and Court of Appeals held that the taxpayers did not acquire the requisite economic interest and were not entitled to the claimed deduction. Although the Government believes that the courts below correctly decided the issue in both cases, we do not oppose the granting of the petitions for certiorari for the following reasons:

1. The question presented is one which appears to be arising with increasing frequency. To date, eight cases, including the instant cases, have been presented to the Courts of Appeals.[1] These cases have reached varying results, some allowing the strip mining contractor the claimed depletion (see *e.g. Commissioner* v. *Gregory Run Coal Co.*, 212 F. 2d 52 (C.A. 4th), certiorari denied, 348 U.S. 828; *Weirton Ice & Coal Sup. Co.* v. *Commissioner*, 231 F. 2d 531 (C.A. 4th)), while others (such as the instant cases and *Usibelli* v. *Commissioner*, 229 F. 2d 539 (C.A. 9th)) hold that

[1] Cases other than the cases at bar are: *Commissioner* v. *Gregory Run Coal Co.*, 212 F. 2d 52 (C.A. 4th), certiorari denied, 348 U.S. 828; *Commissioner* v. *Mammoth Coal Co.*, 229 F. 2d 535 (C.A. 3d), rehearing denied, 229 F. 2d 539, certiorari denied, 352 U.S. 824; *Usibelli* v. *Commissioner*, 229 F. 2d 539 (C.A. 9th); *Weirton Ice & Coal Sup. Co.* v. *Commissioner*, 231 F. 2d 531 (C.A. 4th); *Commissioner* v. *Hamill Coal Corp.*, 239 F. 2d 347 (C.A. 4th); *Stilwell* v. *United States*, 250 F. 2d 736 (C.A. 4th).

the contractors did not acquire the necessary economic interest. Most of the cases have arisen in the Third and Fourth Circuits, and to some extent, at least, these courts appear to have taken a different view as to the relevance of the fact that the strip miner's contract is terminable on short notice at the will of the owner of the coal lands, a factor which the Internal Revenue Service (see G.C.M. 26290, 1950-1 Cum. Bull. 42) has considered to be highly significant. Compare the instant cases with *Weirton Ice & Coal Sup. Co.* v. *Commissioner*, *supra*. This divergence of approach apparently led the court below to state, in consideration of the petition for rehearing in the *Huss* case (Pet. 26): "We are not sure what * * * [the Fourth Circuit] would do in reviewing a decision against the stripper on the facts of our case." But see *Stilwell* v. *United States*, 250 F. 2d 736, 739. Although each of the decided cases involves a different contractual arrangement, there does appear to be a conflict in approach between the Third and Fourth Circuits, unless the latter court's most recent decision in *Stilwell* v. *United States*, *supra*, is construed as a reversal of position by that court.

2. It is important in the administration of the revenue laws that the issue presented be finally resolved. The depletion allowance is one that must be "equitably apportioned between the lessor and lessee" of mineral property. Section 23(m) of the Internal Revenue Code of 1939. Percentage depletion is allowed, under Section 114(b) of the Code, on the "gross income from the property" and, to the extent that the strip miner is allowed a depletion deduction, there

must be a corresponding disallowance of the deduction to the owner of the property. See *Commissioner v. Southwest Expl. Co.*, 350 U.S. 308, 309. Thus, uncertainty as to whether a strip mining contractor is entitled to the deduction makes administration of the law in this respect difficult.

Accordingly, we agree that review by this Court is warranted and that the petitions for certiorari should be granted.

Respectfully submitted,

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